STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Whitbeck, C.J., and Jansen and Markey, J.J.

MARY BAILEY,
Plaintiff-Appellee,

Supreme Court No. 125110

v

OAKWOOD HOSPITAL AND MEDICAL CENTER,
Defendant-Appellant,

Court of Appeals No. 243132

WCAC No. 01-0076

SECOND INJURY FUND,
(VOCATIONALLY HANDICAPPED PROVISION)
Defendant-Appellee.

and

DIRECTOR OF WORKERS' COMPENSATION AGENCY,
Intervenor-Appellee

_____/

POST SUBMISSION BRIEF ON APPEAL - APPELLEE

ORAL ARGUMENT NOT REQUESTED

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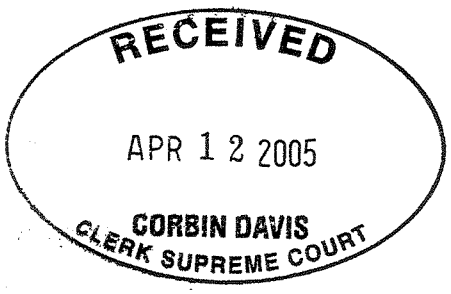

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QUESTIONS PRESENTED FOR REVIEW

I. **In *Haliw v City of Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005), this Court said that construction of a court rule or statute requires the Court to be "mindful of 'the surrounding body of law into which the provision must be integrated . . . .' *Green v Bock Laundry Machine Co.*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed2d 557 (1989) (Scalia, J., concurring)." Section 925(1) [MCL 418.925(1)] of the Worker's Disability Compensation Act [WDCA] imposes a duty to notify the Fund but states no circumstance under which a failure to notify will be excused. Must the provision be integrated with the "surround body of law, " i.e., the WDCA, which contains two other provisions imposing the duty to notify and expressly stating circumstances under which a failure to notify will be excused, thereby requiring the provision to be properly understood as never excusing a failure to notify the Fund?**

II. **Does this Court's opinion in *In re Noecker*, 472 Mich 1; 691 NW2d 440 (2005), support the construction of § 925(1) of the WDCA as mandatory and enforceable notwithstanding the provision's lack of a sanction to be imposed for non-compliance with its duty to notify?**

STATEMENT OF PROCEEDINGS AND FACTS

Defendant-Appellee Second Injury Fund submits this brief to discuss two cases that this Court decided after the submission of the instant cases to the Court on December 8, 2004. The two cases decided after that date are *Haliw v City of Sterling Heights,* 471 Mich 700; 691 NW2d 753 (2005) and *In re Noecker*, 472 Mich 1; 691 NW2d 440 (2005).

ARGUMENT

I. **In *Haliw v City of Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005), this Court said that construction of a court rule or statute requires the Court to be "mindful of 'the surrounding body of law into which the provision must be integrated . . . .' *Green v Bock Laundry Machine Co*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed2d 557 (1989) (Scalia, J., concurring)." Section 925(1) [MCL 418.925(1)] of the Worker's Disability Compensation Act [WDCA] imposes a duty to notify the Fund but states no circumstance under which a failure to notify will be excused. The provision must be integrated with the "surrounding body of law," *i.e.*, the WDCA, which contains two other provisions imposing the duty to notify and expressly stating circumstances under which a failure to notify will be excused. Therefore, § 925(1) is properly understood as never excusing a failure to notify the Fund.**

A. The Surrounding Body of Law Concept.

In *Haliw* this Court considered whether appellate attorney fees and costs can be recovered under MCR 2.403(O) as case evaluation sanctions and answered the question negatively. At page 706, the Court said that the question's resolution required consideration of not only the rule involved but of the Michigan Court Rules as a whole:

> The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole. *When interpreting a court rule or statute, we must be mindful of "the surrounding body of law into which the provision must be integrated . . . ." Green v Bock Laundry Machine Co,* 490 US 504, 528; 109 S Ct 1981; 104 L Ed2d 557 (1989) (Scalia, J., concurring). Here, neither the language of MCR 2.403(O) nor the entire structure of our court rules supports the Court of Appeals construction. Accordingly, we conclude that appellate attorney fees and costs are not recoverable as case evaluation sanctions. (Emphasis added)

Thus, the Court in *Haliw* considered the court rule before it not in isolation but, rather, in the context of the entire schema of the Michigan Court Rules. As discussed immediately below, this Court should similarly consider § 925(1) of the WDCA in the context of the WDCA's two other provisions imposing a duty to notify.

B Section 925(1) of the Worker's Disability Compensation Act ("WDCA") must be considered in the context of that act as a whole, which is the "surrounding body of law." When so considered, it admits of no exception to its notice requirement as none is stated within it, while three other notice requirements of that act expressly permit a failure to notify under statutorily-stated circumstances.

1. Section 925(1) imposes a duty to notify and does not excuse a failure to do so under any circumstances.

Section 925(1) of the Worker's Disability Compensation Act ("WDCA") imposes an obligation to notify the Fund. It provides:

> When a vocationally disabled person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. *Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury.* The fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability. (Emphasis added)

The emphasized sentence requires notice to the Fund within the stated time period. The section describes no factual situation under which a failure to notify will be excused.

2. The WDCA contains two other notice provisions that excuse a failure to under stated factual provisions.

The "surrounding body of law into which [§ 925(1) of the WDCA] must be integrated," *Haliw, supra,* quoting from *Green, supra* (Scalia, J., concurring), is the WDCA. The WDCA contains two provisions imposing a notice requirement and expressly excusing a failure to notify under statutorily-stated circumstances.

a. Section 381(1) [MCL 418.381(1)] of the WDCA.

Section 381(1) [MCL 418.381(1)] of the WDCA requires any employee seeking WDCA benefits to notify his or her employer within a stated time period. It also describes the circumstance under which a failure to notify will be excused. Section 381(1) provides in pertinent part:

> The employee shall provide a notice of injury to the employer within 90 days after the happening of the injury, or within 90 days after the employee knew, or should have known, of the injury. *Failure to give such notice to the employer shall be excused unless the employer can prove that he or she was prejudiced by the failure to provide such notice.* (Emphasis added)

Thus, § 381(1) of the WDCA expressly excuses an employee's failure to notify his or her employer unless the employer can demonstrate prejudice resulting from that failure.

b. Section 383 [MCL 418.383] of the WDCA.

The second WDCA provision requiring notice and excusing a failure to notify under a stated circumstance is § 383 [MCL 418.383] of the act. It provides:

> A notice of injury or a claim for compensation made under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer or the carrier, was in fact misled. *Want of written notice shall not be a bar to proceedings under this act if it be shown that the employer had notice or knowledge of the injury.* (Emphasis added)

Thus, § 383 expressly excuses the failure of written notice of injury to the employer if the employer had actual notice of the injury or knew of it.

C. Discussion

The "surrounding body of law into which [§ 925(1) of the WDCA] must be integrated," *Haliw, supra,* quoting from *Green, supra* (Scalia, J., concurring), is the WDCA. Section 925(1) of the WDCA imposes a duty to notify the Fund and does not excuse a failure to do so under any circumstance. While §§ 381(1) and 383 similarly impose duties to notify, those provisions excuse a failure to notify under statutorily-stated circumstances. Therefore, § 925(1) of the WDCA is properly understood as never excusing a failure to notify the Fund, *Haliw, supra; Green, supra.*

II. This Court's opinion in *In re Noecker,* 472 Mich 1; 691 NW2d 440 (2005), supports the construction of § 925(1) of the WDCA as mandatory and enforceable notwithstanding the provision's lack of a sanction to be imposed for non-compliance with its duty to notify.

In *In re Noecker,* 472 Mich 1; 691 NW2d 440 (2005), this Court held that the respondent in that case should be removed from office, and further held that costs should not be assessed against him. A*micus curiae* Munson Hospital notes that § 925(1) of the WDCA states no sanction to be imposed for failure to comply with its duty to notify, and says *Noecker* supports its assertion that a sanction to be imposed must be textually supported in either a constitution, statute or court rule, *post-submission brief on appeal of amicus curiae Munson Hospital at pages 3-5.* The Fund contends that *Noecker* supports the Fund's contention that § 925(1)'s duty to notify is mandatory and enforceable notwithstanding the provision's lack of a sanction to be imposed for failure to notify.

At page 14, this Court noted that "no specific court rule or statute provides for imposing costs in judicial disciplinary matters," and added that "[w]e have imposed costs in several cases in the past."[1] The parallel between *Noecker* and the instant case is clear. Just as this Court imposed the sanction of costs in three judicial discipline cases notwithstanding the absence of that sanction from any court rule or statute, the Court of Appeals below properly held that the sanction to be imposed for a failure to notify as required by § 925(1) of the WDCA is the Fund's dismissal from the case. *Noecker, supra.*

Moreover, the Court in *Noecker* declined to assess costs against the respondent "because he had no notice of the standards for imposing them." *Noecker, supra,* at page 15. But the

[1] The Court identified *In re Thompson,* 470 Mich 1347 (2004), *In re Trudel,* 468 Mich 1243 (2003), and *In re* Cooley, 454 Mich 1215 (1997), as judicial discipline cases in which the Court imposed costs. *Noecker, supra,* at pages 14-15 n 5, 6 and 7.

parties to the instant case and the bar have had notice since at least the August 25, 2000 decisional date of *Robinson v General Motors Corp,* 242 Mich App 331; 619 NW2d 411 (2000), that held a failure to notify the Fund as § 925(1) of the WDCA requires will result in the Fund's dismissal.

RELIEF SOUGHT

Defendant-appellee Second Injury Fund asks the Court to hold that the Court of Appeals correctly decided both *Robinson v General Motors Corp,* 242 Mich App 331; 619 NW2d 411 (2000), and *Valencic v TPM, Inc,* 248 Mich App 601; 639 NW2d 846 (2002), and to affirm the Court of Appeals opinion below.

Respectfully submitted,

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